

COUGHLIN DUFFY LLP

Adam M. Smith (AS8124)

Michael J. Aiello (MA7828)

350 Mount Kemble Avenue

P.O. Box 1917

Morristown, New Jersey 07962-1917

(973) 267-0058

Attorneys for Plaintiff, Zurich American Insurance Company

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

ZURICH AMERICAN INSURANCE
COMPANY

Plaintiff,

v.

EVEREST NATIONAL INSURANCE
COMPANY and DMJ INDUSTRIAL
SERVICES LLC

Defendants,

DOCKET NO:

Civil Action

**COMPLAINT FOR DECLARATORY
JUDGMENT**

Document Filed Electronically

Plaintiff, Zurich American Insurance Company (“Zurich”), by way of Complaint for Declaratory Judgment against defendants, Everest National Insurance Company (“Everest”) and DMJ Industrial Services LLC (“DMJ”), alleges as follows:

NATURE OF THE ACTION

1. This declaratory judgment action arises from the personal injury action entitled *Timothy Mahoney vs. Union Paving and Construction Company, et al.*, Docket No. HUD-L-433-17 (the “Underlying Action”).

2. Zurich issued Commercial General Liability Policy Number GLO 3866246-10 to Union Paving and Construction (“Union”), for the period April 1, 2015 to April 1, 2016 (the

“Zurich Policy”), and is currently providing the defense for Union in the Underlying Action under the Zurich Policy.

3. Everest issued Commercial General Liability Policy Number CF4GL00587-151 to DMJ, for the period September 8, 2015 to September 8, 2016 (the “Everest Policy”).

4. Union and DMJ entered a Subcontract dated April 2, 2015, (the “Subcontract”) which provides that DMJ would procure Commercial General Liability Insurance naming Union as an additional insured.

5. Zurich has repeatedly tendered Union’s defense and indemnity for the Underlying Action to Everest on the ground that Union qualifies as an additional insured under the Everest Policy.

6. Although Everest has acknowledged that Union qualifies as an additional insured under the Everest Policy, it has refused to defend Union on a primary, non-contributory basis in accordance with its policy language.

7. In this action, Zurich seeks a declaration that Everest has a duty to defend and indemnify Union in the Underlying Action on a primary, non-contributory basis, under the Everest Policy.

PARTIES

8. Zurich is a New York corporation, engaged in the insurance business, with a statutory home office located at 4 World Trade Center, 150 Greenwich Street, New York, New York 10007, and a principal place of business in Illinois.

9. Everest is a New Jersey corporation with a principal place of business in New Jersey.

10. DMJ is a New Jersey limited liability company with a principal place of business in New Jersey.

JURISDICTION AND VENUE

11. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1332, §2201 and §2202 because: (i) there is an actual controversy between the parties; (ii) the amount in controversy exceeds \$75,000, exclusive of interest and costs; and (iii) the matter is between citizens of different states.

12. Venue is proper under 28 U.S.C. §1391 because a substantial part of the events giving rise to the claim occurred in this district.

THE UNDERLYING ACTION

13. On or about January 26, 2017, Timothy Mahoney ("Mahoney") filed the Underlying Action against Union. A copy of the Complaint in the Underlying Action is attached hereto as Exhibit A.

14. Mahoney alleges that he was injured on January 15, 2016, while working as an iron worker employed by DMJ on the Bayonne Bridge/Turnpike Extension.

15. Mahoney alleges that a caisson, approximately twenty-five long and five feet in diameter, began to roll, striking Mahoney as he attempted to avoid the structure.

16. The Complaint asserts a cause of action against Union for negligence, alleging, among other things, failure to exercise due care for the safety of Mahoney.

THE SUBCONTRACT

17. The insurance provision of the Subcontract set forth as follows:

INSURANCE

12.1 **SUBCONTRACTOR'S INSURANCE.** Prior to the start of Subcontractor's Work, the Subcontractor shall procure and maintain in force until final completion and acceptance of the Prime Contract by the Owner, Worker's

Compensation Insurance, Employer's Liability Insurance, Comprehensive or Commercial General Liability Insurance on an occurrence basis, pollution or professional coverage when required, professional on occurrence or claims made basis, and all insurance required of the Contractor under the Prime Contract. The Contractor, Owner and other parties as designated in the Prime Contract shall be named as additional insured on each of these policies.

18. Based on the insurance provision to the Subcontract, Union was to be an additional insured under the Everest Policy issued to DMJ.

THE EVEREST POLICY

19. Everest issued the Everest Policy to DMJ for the policy period September 8, 2015 to September 8, 2016, with liability limits of \$2,000,000 per occurrence and \$4,000,000 in the aggregate.

20. The Everest Policy includes the following Additional Insured Provision:

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. Section II-Who Is An Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury caused in whole or in part, by

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf; in the performance of your ongoing operations for the additional insured.

21. The Everest Policy includes a Primary and Noncontributory – Other Insurance Condition endorsement which modifies the Other Insurance Condition as follows:

PRIMARY AND NONCONTRIBUTORY –

OTHER INSURANCE CONDITION

The following is added to the **Other Insurance** Condition and supersedes any provision to the contrary:

Primary and Noncontributory Insurance

This insurance is primary to and will not seek contribution from any other insurance available to an additional insured under your policy provided that:

- (1) The additional insured is a Named Insured under such other insurance; and
- (2) You have agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured.

CLAIMS CORRESPONDENCE

22. By email dated May 12, 2017, Zurich tendered defense and indemnity of Union to Everest.

23. By letter dated March 8, 2018, Sedgwick Claims Management (“Sedgwick”), on behalf of Everest, accepted Zurich’s tender of defense pursuant to a reservation of rights, stating that Everest’s indemnification of Union would extend only to the negligent acts or omissions of DMJ and not to those of Union. The letter further stated Everest was “open to discussing settlement options with under a scenario where Everest and Zurich join forces to enter into and ultimately fund settlement in this matter.”

24. By email dated June 21, 2018, Zurich requested Everest reconsider its position and agree to defend Union in the Underlying Action without reservation and requesting Zurich’s contribution to any settlement.

25. By letter dated June 25, 2018, Sedgwick, on behalf of Everest reiterated their accepted Zurich’s tender of defense pursuant to a reservation of rights.

26. By email dated July 12, 2018, Zurich requested Everest re-review their position and fully accept Zurich's tender without reservation. Everest never responded to Zurich's July 12, 2018 email.

**COUNT ONE DECALARATORY JUDGMENT: EVEREST HAS A DUTY TO
DEFEND UNION**

27. Zurich repeats and re-alleges each and every allegation in Paragraphs 1 through 23 as if fully set forth herein.

28. Under the terms of the Everest Policy, Everest has an obligation to defend Union as additional insureds in the Underlying Action on a primary, non-contributory basis.

29. To date, Everest has failed to acknowledge its obligation to defend Union in the Underlying Action.

30. An actual case or controversy exists between Zurich and Everest concerning Union's entitlement to a defense for the Underlying Action under the Everest Policy.

31. A resolution of this dispute is necessary to resolve Everest's duty to defend Union in the Underlying Action and to reimburse Zurich for fees and expenses, which it has expended on Union's defense.

32. Therefore, Zurich seeks a judicial determination and declaration that Everest is obligated to defend Union in the Underlying Action on a primary, non-contributory basis.

**COUNT TWO DECALARATORY JUDGMENT: EVEREST HAS A DUTY TO
INDEMNIFY UNION**

33. Zurich repeats and re-alleges each and every allegation in Paragraphs 1 through 29 as if fully set forth herein.

34. Under the terms of the Everest Policy, Everest has an obligation to indemnify Union as additional insureds in the Underlying Action on a primary, non-contributory basis.

35. To date, Everest has failed to acknowledge its obligation to indemnify Union in the Underlying Action.

36. An actual case or controversy exists between Zurich and Everest concerning Union's entitlement to indemnity for the Underlying Action under the Everest Policy.

37. A resolution of this dispute is necessary to resolve Everest's duty to Union in the Underlying Action.

COUNT THREE EQUITABLE SUBROGATION

38. Zurich repeats and re-alleges each and every allegation in Paragraphs 1 through 35 as if fully set forth herein.

39. Zurich has paid all of Union's defense costs in the Underlying Action.

40. Everest wrongfully failed to provide Union with a defense in the Underlying Action.

41. Everest's failure to provide a defense to Union on a primary, non-contributory basis in the Underlying Action is in violation of the terms of the Everest Policy.

42. As a direct and proximate result of Everest's failure to provide a defense in violation of its obligations set forth in the Everest Policy, Zurich has incurred considerable defense costs on behalf of Union.

43. An actual and justiciable controversy exists between Zurich and Everest regarding Everest's obligation to reimburse Zurich for the defense costs incurred on behalf of Union in the Underlying Action.

44. Accordingly, the Court should award to Zurich, and order Everest to pay, all amounts that Zurich has incurred, or will incur, in the defense of Union in the Underlying Action, from the date of initial tender to the present, plus interest.

PRAYER FOR RELIEF

WHEREFORE, Zurich respectfully requests that the Court enter a judgment:

1. On the first cause of action, declaring Everest must defend Union in the Underlying Action as insureds on a primary, non-contributory basis.
2. On the second cause of action, declaring Everest must indemnify Union in the Underlying Action as insureds on a primary, non-contributory basis.
3. On the third cause of action, awarding Zurich money damages against Everest for all defense costs incurred by Zurich in the defense Union in the Underlying Action, plus interest.
4. For such other and further relief as the Court deems just and proper.

COUGHLIN DUFFY LLP

By: /s/ Adam M. Smith
Adam M. Smith, Esq.
Michael J. Aiello, Esq.
350 Mount Kemble Avenue
P.O. Box 1917
Morristown, New Jersey 07962-1917
Attorneys for Plaintiffs,
Zurich American Insurance Company

Dated: November 16, 2018

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

ZURICH AMERICAN INSURANCE COMPANY

(b) County of Residence of First Listed Plaintiff Cook County (IL)
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Coughlin Duffy
350 Mount Kemble Ave. Morristown, NJ 07962 (973) 267-0058

DEFENDANTS

EVEREST NATIONAL INSURANCE COMPANY and DMJ INDUSTRIAL SERVICES LLC

County of Residence of First Listed Defendant Somerset County (NJ)
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question
(U.S. Government Not a Party)
- ☒ 4 Diversity
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|---------------------------------------|---|---------------------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input checked="" type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input checked="" type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input checked="" type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability LABOR <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. Sections 132, 2201-2

Brief description of cause:
Declaratory Judgment

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE Joseph V Isabella

DOCKET NUMBER HUD-L-433-17

DATE

11/16/2018

SIGNATURE OF ATTORNEY OF RECORD

/s/ Adam Smith

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE